BEFORE

THE PUBLIC SERVICE COMMISSION

OF SOUTH CAROLINA

Docket No. 2017-292-WS

In Re:	)	
	)	
Application of Carolina Water Service, Inc. for Approval of an Increase in its Rates for Water and Sewer Services	)	**PETITION FOR REHEARING AND RECONSIDERATION**
	)	
	)	
	)	

Pursuant to S.C. Code § 58-5-330 and 10 S.C. Code Ann. Regs. 103-825 and applicable South Carolina law, Carolina Water Service, Inc. ("CWS" or "Company") hereby petitions the Public Service Commission of South Carolina ("Commission") to rehear and reconsider a portion of its rulings in Order No. 2018-802 ("Order"). The Order was served on CWS on January 25, 2019. As explained further below, the Commission should rehear and reconsider its decision in Order No. 2018-802 to deny recovery of litigation expenses for the case entitled *Congaree Riverkeeper, Inc. v. Carolina Water Service, Inc*. ("*Riverkeeper*") for the following reasons.

(1) In violation of the provisions of S.C. Code Ann. §1-23-320 and the Due Process provisions of the South Carolina and United States Constitutions, the basis for the Commission's ruling on recovery of litigation expenses for the *Riverkeeper* case was different from the basis upon which the Commission granted rehearing on that issue in Order No. 2018-494.

(2) The uncontradicted evidence presented to the Commission regarding the *Riverkeeper* litigation showed that CWS's defense of that case was prudent, reasonable, unavoidable and beneficial to ratepayers. Accordingly, it was an error of law for the Commission to deny recovery of the expenses of such defense.

(3) Because the *Riverkeeper* litigation was not finalized at the time that the Commission issued the Order, the Commission should have treated the *Riverkeeper* litigation expenses in the same way that it treated litigation expenses for the ALC cases, by ordering CWS to establish a regulatory asset to be considered in a future rate case when the final outcome of the *Riverkeeper* litigation is known.[1]

BACKGROUND

The *Riverkeeper* litigation arose from a complex set of issues arising under the provisions of the Federal Clean Water Act ("CWA"), 33 U.S.C. §§1251 *et seq*. and spawning sporadic litigation for approximately two decades. The background is fully developed in the record of this docket and will be very briefly summarized here. In 1994 CWS was issued a permit pursuant to the National Pollutant Discharge Elimination System ("NPDES") of the CWA that allowed CWS to discharge treated effluent from its I-20 wastewater treatment plant. That permit included a provision that the I-20 facility be connected to a permanent, regional treatment facility when such a connection was "constructed and available."

The only feasible possible connection was with a regional system operated by the Town of Lexington ("the Town"). Beginning in the late 1990s, CWS began efforts to interconnect its system with that of the Town, but despite the efforts of CWS, the South Carolina Department of Health and Environmental Control ("DHEC"), the Central Midlands Council of Governments and various other entities, the connection was not completed until February, 2018 when it was taken over by the Town as a part of a condemnation action brought by the Town. See Transcript, at pp. 167-171.

[1] With regard to this ground for rehearing and reconsideration, CWS will ask the Commission to consider facts arising since the issuing of the Order, as permitted by S.C. Code Ann. §58-5-330.

The difficulty of completing the connection is illustrated by the decision made by this Commission in Order No. 2003-10 in Docket No. 2002-147-S. In that case the Commission considered the approval of a wholesale treatment agreement proposed by the Town of Lexington to CWS. The Commission rejected the agreement, finding that it was not in the public interest because it would result in excessive rates to CWS customers and because it would inappropriately require those customers to subsidize capacity for future growth and expansion of the Town's system. Order No. 2003-10 at p. 13.

Following the rejection of the contract there were additional efforts to arrange for interconnection of the I-20 discharge into the regional system but no satisfactory arrangement was finalized and the Town had not yet commenced condemnation proceedings to take the system and complete the interconnection. The *Riverkeeper* case was filed in January 2015 seeking injunctive relief requiring CWS to close the I-20 facility and interconnect its discharge to the regional system. The issues raised in the *Riverkeeper* litigation were the same issues that had proved difficult since the 1990s: whether the Town of Lexington had an obligation to provide wholesale interconnection on terms that would be approved by this Commission; what authority DHEC had to require the Town and CWS to reach agreement; and whether interconnection to the regional treatment facility was "available" as required under the CWS NPDES permit. On March 30, 2017, an order granting summary judgment against CWS was entered in the *Riverkeeper* case. It was this order that was cited by the Commission as the principal basis for its denial of recovery of litigation expenses for the *Riverkeeper* litigation. See Order No. 2018-802, at pp. 13-18.

The order granting summary judgment did not end the *Riverkeeper* litigation and at the time of the Commission's decision remained subject to a potential appeal. Most recently, and subsequent to the rehearing in this docket, the parties have informed the court that they are

conducting settlement negotiations and the court has issued orders staying the proceedings. See attached Exhibits 1 through 4.

GROUNDS FOR REHEARING AND RECONSIDERATION

1. The Basis for the Commission's Decision to Deny Recovery of *Riverkeeper* Litigation Expenses is Different from the Basis Upon Which Rehearing Was Granted.

In order No. 2018-494 the Commission granted rehearing regarding litigation costs and required the parties to provide disaggregated expense records so that the Commission could "address the reasonableness of the fees in each particular case based on the factors listed in Commission Order 2006-543, page 27." Order No. 2018-494, at p. 1. In Order No. 2006-543 the Commission applied the factors of Rule 1.5, Rule of Professional Conduct, Rule 407 SCACR, citing the application of those factors in *Condon v. State of South Carolina,* 354 S.C. 634, 583 S.E.2d 430 (2003). As Rule 1.5 and the *Condon* case make clear, the seven factors of Rule 1.5 apply to determine the reasonableness of attorneys' fees and not the separate question of whether attorneys' fees can be recovered in utility rates.

The Commission's decision to refuse to allow CWS to recover for litigation expenses from the *Riverkeeper* case was not based on an application of the Rule 1.5 factors. Instead, the Order addresses the *Riverkeeper* expenses in terms of whether the expenses were reasonable and necessary to the provision by CWS of utility services to its customers. See Order No. 2018-802, at pp. 18-19. In support of its decision to refuse to allow recovery for the *Riverkeeper* litigation expenses the Order cites *State ex rel. Utilities Commission v. Public Staff, North Carolina Utilities Commission,* 317 N.C. 26, 343 S.E.2d 898 (1986). That case applied utility rate regulation principles and precedent to the question of whether the utility could recover litigation expenses in

rates charged to its customers. That issue is fundamentally different from the determination of the reasonableness of fees under Rule 1.5

The South Carolina Administrative Procedures Act requires that all parties to a contested case be provided notice of the issues to be determined in such proceeding. S.C. Code Ann. §1-23-320. Article I, Section 22 of the South Carolina Constitution provides that no person may be bound by a decision of an administrative agency "except on due notice and an opportunity to be heard." The 14th Amendment to the U.S. Constitution also requires that the administrative agencies of the states must provide due process, including notice and an opportunity to be heard. The Order failed to provide CWS the notice required by these statutory and constitutional provisions. Accordingly, it should be vacated and a rehearing should be ordered with appropriate notice of the issues to be considered by the Commission.

2. The Provisions of Order No. 2018-802 Refusing to Allow Recovery of *Riverkeeper* Litigation Expenses Is Wrong as a Matter of Law Because the Record Does Not Provide a Basis to Overcome the Presumption that the Expenses Were Reasonable and Incurred in Good Faith.

Under well-established South Carolina law, "[a]lthough the burden of proof of the reasonableness of all costs incurred which enter into a rate increase request rests with the utility, the utility's expenses are presumed to be reasonable and incurred in good faith." *Hamm v. South Carolina Public Service Commission*, 309 S.C. 282, 266, 422 S.E.2d 110, 112 (1992). The record in this docket does not provide a basis for overcoming the presumption that the Company's *Riverkeeper* litigation expenses were reasonable and incurred in good faith. Instead, the record shows that CWS was at all times willing to enter into an interconnection agreement with the Town that was consistent with the ruling by this Commission in Order No. 2003-10 in which an interconnection agreement proposed by the Town was rejected because of its negative impact on CWS ratepayers. The efforts of CWS in its negotiations with the Town and in its litigation of the

Riverkeeper case were intended to benefit CWS customers by obtaining interconnection on terms that would be reasonable and appropriate and could be approved by the Commission. Tr. at pp. 167-169.

The efforts by CWS to obtain an interconnection agreement that would be acceptable to this Commission were supported by rulings on similar issues by the South Carolina Supreme Court. In *City of Columbia v. Board of Health and Environmental Control*, 292 S.C. 199, 355 S.E.2d 536 (1987) the Court addressed a similar impasse between a private sewer company and a municipality. In that case DHEC ordered the City of Columbia to either (1) acquire by condemnation or negotiation certain wastewater treatment facilities owned by the utility, or (2) allow the utility to interconnect its facilities to those of the City. On appeal, the Supreme Court affirmed the authority of DHEC to order Columbia to take those actions.

In the related case of *Midlands Utility, Inc. v. S.C. Department of Health and Environmental Control*, 313 S.C. 210, 437 S.E.2d 120 (1993) the Court considered a series of fines imposed by DHEC on the utility and held that as to certain of them DHEC could not fine the utility for permit violations that occurred during the time that Columbia was appealing the DHEC orders considered in the *City of Columbia* case. The utility made the showing that it had been unable to meet its permit limits without upgrading its facilities and that it had not been allowed to upgrade its facilities while the *City of Columbia* case was being appealed and decided. The Court found that "[b]ecause the City of Columbia, not Midlands, was the primary cause of the continued discharges at the Lincolnshire and Washington Heights systems, we hold the circuit court abused its discretion by assessing a fine against Midlands for these discharges." *Midlands Utility, supra,* 313 S.C. at 212.

The record in this proceeding shows that CWS consistently pursued an interconnection agreement that would have resulted in rates that were fair to its customers. Its course of action was supported by the Commission decision in Order No. 2003-10 and by the decisions of the Supreme Court in the *City of Columbia* and *Midlands Utility* cases. The summary judgment order in the *Riverkeeper* litigation is clearly inconsistent with these prior authorities relied upon by CWS. Accordingly, recovery of litigation expenses for defending the Riverkeeper case is analogous to this Commission's treatment of recovery of GridSouth expenses by jurisdictional electric utilities. In Orders No. 2005-2 and 2010-79 the Commission allowed South Carolina Electric & Gas ("SCE&G") and Duke Energy Carolinas, LLC ("DEC"), to recover their expenses incurred in pursuing the development of a regional transmission organization. The effort was begun in response to policies of the Federal Energy Regulatory Commission ("FERC") and then abandoned when FERC policy changed. See Order No. 2005-2, pp. 14-24 and Order No. 2010, p. 15. The Commission allowed SCE&G and DEC to recover their GridSouth development costs amortized over a period of five years.

In the *Riverkeeper* litigation CWS pursued an interconnection agreement with the Town of Lexington in a way that was consistent with the rulings of this Commission and the South Carolina Supreme Court. The District Court's ruling in the *Riverkeeper* case on summary judgment was inconsistent from the previous authorities that had guided CWS's actions. That change is similar to the FERC change in policy that led to the abandonment of the GridSouth project by SCE&G and DEC. The Commission should treat the CWS *Riverkeeper* litigation expenses in the same fashion as it treated the GridSouth expenses. The record in this proceeding provides no basis for a finding to overcome the presumption that CWS's *Riverkeeper* expenses were reasonable and incurred in good faith.

3. Because the *Riverkeeper* Litigation Was Not Finalized at the Time the Commission Issued the Order the *Riverkeeper* Litigation Expenses Should Have Been Treated as a Regulatory Asset for Consideration at a Later Time.

In the Order, the Commission decided that ratemaking treatment for CWS litigation expenses for the "ALC Cases" should be deferred because the "cases have not yet been concluded, and no final order has been issued." Order No. 2018-802 at p. 21. CWS submits that the Commission should take the same approach with the *Riverkeeper* litigation expenses since there has not been a final disposition of the *Riverkeeper* litigation and in light of the settlement discussions reflected in Exhibits 1 through 4. Under S.C. Code Ann. §58-5-330 the Commission is expressly authorized, in determining whether to reconsider a previous ruling, to consider all facts "including those arising since the making of the order or decision…" Under the circumstances presented here, it is appropriate for the Commission to reconsider its treatment of the *Riverkeeper* litigation expenses and to treat those expenses in similar fashion to the expenses of the ALC Cases.

CONCLUSION

The Commission should rehear and reconsider those portions of the Order addressing the treatment of the *Riverkeeper* litigation expenses. The Commission's rulings concerning the *Riverkeeper* litigation expenses are unlawful as specified in this petition. Accordingly, the Commission should rehear and reconsider its decision on such issues and modify its rulings consistent with the grounds stated in this petition.

Dated this 14th day of February, 2019.

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Attorneys for Carolina Water Service, Inc.

EXHIBIT 1

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

CONGAREE RIVERKEEPER, INC, Plaintiff, v. CAROLINA WATER SERVICE, INC., Defendant.	)	C.A. No. 3:15-cv-194-MBS **CONSENT MOTION TO STAY**

Defendant Carolina Water Service, Inc., with the consent of Plaintiff Congaree Riverkeeper, Inc., requests that the Court stay all proceedings in this action for 15 days pending resolution of the productive settlement agreement negotiations currently occurring between the parties. A proposed order is attached for the Court's consideration as **Exhibit A.**

Respectfully submitted, this 8th day of January, 2019.

[*Signature page following*]

Respectfully submitted,

s/ *Rita Bolt Barker*

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January 8, 2019
Columbia, South Carolina

From: SCDEfilingstat@scd.uscourts.gov
Sent: Thursday, January 10, 2019 2:15 PM
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U.S. District Court

District of South Carolina

Notice of Electronic Filing

The following transaction was entered on 1/10/2019 at 2:14 PM EST and filed on 1/10/2019
Case Name: Congaree Riverkeeper Inc v. Carolina Water Service Inc
Case Number: 3:15-cv-00194-MBS
Filer:
WARNING: CASE CLOSED on 03/30/2017
Document Number: 125(No document attached)

Docket Text:
TEXT ORDER granting [124] Motion to Stay proceedings for 15 days. The Court will lift the stay on January 28, 2019, unless notified of need for extension by the parties. Signed by Honorable Margaret B Seymour on 1/10/2019.(mdea)

3:15-cv-00194-MBS Notice has been electronically mailed to:

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EXHIBIT 3

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

CONGAREE RIVERKEEPER, INC, Plaintiff, v. CAROLINA WATER SERVICE, INC., Defendant.	)	C.A. No. 3:15-cv-194-MBS **SECOND CONSENT MOTION TO STAY**

Defendant Carolina Water Service, Inc., with the consent of Plaintiff Congaree Riverkeeper, Inc., requests that the Court stay all proceedings in this action for an additional 7 days pending resolution of the productive settlement agreement negotiations currently occurring between the parties. The Court previously stayed the case for 15 days, through January 28, 2019. Dkt. No. 125. The parties respectfully request additional time to complete their negotiations. A proposed order is attached for the Court's consideration as **Exhibit A.**

Respectfully submitted, this 24th day of January, 2019.

[*Signature page follows*]

Respectfully submitted,

s/ *Rita Bolt Barker*

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January 24, 2019
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EXHIBIT 4

From: SCDEfilingstat@scd.uscourts.gov
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U.S. District Court

District of South Carolina

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Case Number: 3:15-cv-00194-MBS
Filer:
WARNING: CASE CLOSED on 03/30/2017
Document Number: 127

Docket Text:
ORDER granting [126] Motion to Stay proceedings for 7 days. The Court will lift the stay on February 4, 2019, unless notified of need for extension by the parties. Signed by Honorable Margaret B Seymour on 1/25/2019.(mdea)

3:15-cv-00194-MBS Notice has been electronically mailed to:

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7a2e5adc4622fc3639a8c60f0acfc8f81d032b0962fe87237b6da77b5f54b]]

BEFORE
THE PUBLIC SERVICE COMMISSION
OF SOUTH CAROLINA
Docket No. 2017-292-WS

In Re:	)	
	)	
Application of Carolina Water Service, Inc. for Approval of an Increase in its Rates for Water and Sewer Services	)	**CERTIFICATE OF SERVICE**

This is to certify that I, Toni C. Hawkins, paralegal with the law firm of Robinson Gray Stepp & Laffitte, LLC have this day served a copy of **Carolina Water Service, Inc.'s Petition for Rehearing and Reconsideration** in the foregoing matter to the parties listed below by electronic mail:

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Dated this 14th day of February, 2019.

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